or should have known, that automobile engines would be running. The fact that the violation in issue is a result of an act of omission rather than an act of commission is utterly immaterial. *Bush Terminal Bldgs. Co. v. Luckenbach S. S. Co.*, 9 N. Y. 2d 426, 214 N.Y.S. 2d 428, 174 N. E. 2d 516 (1961)

Wholly different are the many cases in which the accident occurred not because of a defect in defendant's plant but because the plaintiff used unsafe materials not under the control or supervision of the defendant. *Gasper* v. *Ford Motor Co.*, 13 N. Y. 2d 104, 242 N.Y.S. 2d 205 (1963); *Wallach* v. *United States*, 291 F. 2d 69 *cert. denied* 368 U. S. 935; *McFall* v. *Compagnie Maritime Belge* (Lloyd Royal S. A., 304 N. Y. 314, 107 N. E. 2d 463 (1952).

Defendant's reliance on *Jackson* v. *Associated Dry Goods Corp.*, 13 N. Y. 2d 112, 242 N.Y.S. 2d 210 (1963), is misplaced. There the plaintiff was injured when she fell over loose gravel in defendant's parking lot. The defendant cross-claimed against the Posillico Construction, Inc. The Court of Appeals held that the cross-claim would lie because the defendant could not be guilty of active negligence solely because it had constructive notice of the rocks in the driveway. Posillico, however, was unquestionably and undeniably negligent in that case because the rocks were left over from construction work done by Posillico for Nassau County.

In the case at bar, however, Larsen has failed to impute any negligence to Ford via the acts of Ford's employees.

Defendant Larsen's attempt to show that it had not violated a "non-delegable duty statute" like § 241 of the Labor Law, is irrelevant. Defendant cites *Semanchuck* v.

Fifth Avenue and 37th Street Corp., 290 N. Y. 419, 49 N. E. 2d 508 (1943) and *Wischnie* v. *Borsch*, 296 N. Y. 257, 72 N. E. 2d 700 (1947). Analogized to the facts of the instant case the most that these cases could stand for is the proposition that if Ford were negligent Larsen in the appropriate factual setting could obtain indemnity from Ford. Ford, however, was not negligent. Accordingly, *Semanchuck* and *Wischnie* do not help the defendant.

The cross-claim over must fail. Defendant Larsen must bear the consequences of its violation of §§ 200 and 299 alone.

DAMAGES

The provable damages supported by a preponderance of the evidence are as follows:

Estimated pecuniary benefits from earnings already lost to date of judgment.[8]	$ 51,100.00
Estimated present value of future lost benefits from decedent's earnings (discounted at 5 percent)	139,000.00
Estimated value of personal services and attention which decedent would have given to and which would have been of material value to his family	24,000.00
Funeral expenses	1,799.00

At the time of his death, Gasperino, then at age 46, had a life expectancy of 26.3 years and a work expectancy of 18.8 years. For each of the five years directly preceding

[8] The discount is not applied to periods antedating judgment. *Montellier* v. *United States*, 202 F. Supp. 384, 424 (E.D.N.Y.), *aff'd* 315 F. 2d 180 (2d Cir. 1963).

his death Gasperino had earned an average of approximately $10,000.00, and, based upon his excellent past record, Gasperino could look forward to earning in the future increased amounts resulting from merit and promotional increases. The evidence adduced at the trial also indicates that Gasperino contributed the whole of his salary to his family except for $15.00 each week which he required for personal use. Accordingly, this court finds that from the time of his death until the date of this judgment, Gasperino would have earned $55,000.00 and would have contributed $51,100.00 of that amount to his family. Based upon a consideration of Gasperino's life expectancy, his work qualifications, his income and prospects and his practice in respect to supporting his family, the court finds that during the course of the remainder of his work expectancy (approximately fourteen years), Gasperino would have earned $212,708.00, and would have contributed $202,000.00 of that amount to his family. The present value of $202,000.00 discounted at an interest rate of 5 percent comes to $139,000.00. Thus, this court finds that plaintiff is entitled to a total of $190,100.00 for the amount of contribution Gasperino would have made to his family had he been permitted to enjoy the years of life to which he normally could have looked forward.

In addition to the value of the lost contributions, the plaintiff is entitle to recover on behalf of the children for the loss of parental care and guidance, provided that there be evidence of the fitness of the parent and that the children have been deprived of the advantages of a good parental relationship and strong father image. The record is abundantly clear that Gasperino was a good father; he was diligent and attentive to the needs of his children. He spent much time with them and personally trained his sons in the skills of his trade. Had Gasperino been

able to enjoy the full span of his life he would have been able in his role as a father to continue to guide and assist in the moral and educational upbringing of his children. While it is difficult to fix a precise mathematical decimal point value for the deprivation of this parental care and guidance, nevertheless the deprivation of intellectual, moral, and physical training suffered by the children is such as to admit of an evaluation based on an estimate of the reasonable value of the loss involved. The court finds, in view of the close relationship that existed between Gasperino and his three children, that Judith Gasperino (aged 19 at the time of father's death) is entitled to $2000.00; that Gregory Gasperino (aged 17 at the time of father's death) is entitled to $4000.00; and that Anthony Gasperino (aged nearly 12 at the time of father's death) is entitled to $18,000.00. In sum, the court finds that $24,000.00 is a reasonable award for the deprivation suffered by decedent's children.

Finally the plaintiff is entitled to funeral expenses incurred on Gasperino's behalf in the amount of $1,799.00.

Thus, the court finds that the total amount of the damages sustained by the beneficiaries of Gregory Gasperino to be $215,899.00 plus interest of $64,770.00. Judgment in the amount of $280,669.00 is to be entered solely against Larsen Ford, Inc. Accordingly, the claim over against Ford Motor Company fails in all respects.

The foregoing constitutes the findings of fact and conclusions of law of the court under Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.

So ordered.

DAVID M. EDELSTEIN,
U. S. D. J.

Dated: New York, N. Y., June 5, 1969.

Filed June 5, 1969,
U.S.D.C. S. D. of N. Y.

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SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM 1970

No. 647

LARSEN FORD, INC.,

Petitioner,

against

NANCY GASPERINO, as Administratrix of the Estate of Gregory Gasperino, Deceased,

and

FORD MOTOR COMPANY,

Respondents.

BRIEF FOR RESPONDENT, FORD MOTOR COMPANY, IN OPPOSITION TO PETITION OF LARSEN FORD, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Introductory Statement

This brief is being submitted by Respondent, Ford Motor Company, the Third-Party Defendant-Appellee below, in opposition to the petition of Larsen Ford, Inc., the Defendant and Third-Party Plaintiff-Appellant below, for a writ of certiorari to the United States Court of Appeals for the Second Circuit herein.

This action, in which Federal jurisdiction is based on diversity of citizenship, was commenced by Respondent, Nancy Gasperino, as Administratrix of the Estate of Gregory Gasperino, Deceased, against Larsen Ford, Inc., in the United States District Court for the Southern District of New York, to recover damages for the wrongful death of said decedent. Gasperino, an employee of Ford Motor Company, died from a coronary thrombosis caused by the inhalation of carbon monoxide fumes while he was working in the basement of the building occupied by Larsen Ford, Inc., a Ford Motor Company dealer, in White Plains, New York. For a substantial monetary consideration, Larsen Ford, Inc., had made the basement of the building available to Ford Motor Company for the work which Gasperino was doing at the time that he met his death.

The complaint in the action charges Larsen Ford, Inc., with negligence in violating Section 299 of the Labor Law of the State of New York, in failing to have the basement of the building adequately ventilated, as mandated by said statute, and, in addition thereto, in violating Section 200 of the Labor Law of the State of New York, which mandates that "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places".

The case was tried before District Judge David N. Edelstein, without a jury, in the United States District Court for the Southern District of New York. In an opinion and decision reported at 300 F. Supp. 1182, which will be found at pages 37-55 of the petition of Larsen Ford, Inc., herein, the District Court specifically found that Larsen Ford, Inc., violated Section 299, and, in addition thereto, that said defendant also violated Section 200, of the New York Labor Law, and that each of said statutory violations was a proximate cause of the decedent's death and that the de-

cedent himself was not guilty of any contributory negligence. The Court, after meticulously itemizing the various elements of damages sustained by the decedent's Estate, found that "the total of the damages sustained by the beneficiaries of Gregory Gasperino to be $215,899.00, plus interest of $64,770.00", making a total recovery in the sum of $280,669.00. In addition thereto, the District Court dismissed the third-party complaint of Larsen Ford, Inc., against Ford Motor Company, which was based solely on the theory of common-law indemnity, on the ground that the negligence of Larsen Ford, Inc., was "active", which under well settled principles of the common-law of the State of New York bars common law indemnity to an active wrongdoer (Petition, pp. 37-55).

The judgment below was thereafter unanimously affirmed by the United States Court of Appeals in the Second Circuit in an opinion by Senior Circuit Judge Danaher, who was then sitting in the Second Circuit, which is reported at 426 F. 2d 1151, and will be found at pages 30-36 of the petition of Larsen Ford, Inc., for a writ of certiorari herein.

In affirming the judgment below the Court of Appeals sustained all of the findings of District Judge Edelstein, except his finding that Larsen Ford, Inc., violated Section 299 of the New York Labor Law. The Court neither affirmed nor rejected this finding. Instead, it merely stated in a footnote to its opinion that "without hesitancy we could agree (with this finding) had Gasperino been employed by Larsen" and the Court then added that "We have been cited to no decision of the New York Court of Appeals, and our own diligent research has disclosed none, which holds that § 299 applies to a workman employed by other than the owner or lessee of the building in which operations are being conducted" and stated that "We think it unnecessary further to consider Judge Edelstein's appealing treatment of the aspect of the case, for we are sat-

isfied that the judgment must be affirmed upon his alternative conclusion that Section 200 of the Labor Law here applied" (Petition, p. 34).

It will thus be seen that the finding of District Judge Edelstein still stands unreversed, even though the Court of Appeals may have entertained some doubts as to its propriety.

Statement of the Case

On April 6, 1964, the date that he died, Gregory Gasperino, the decedent herein, was an assistant service manager in the employ of Ford Motor Company, hereinafter designated "Ford", the Third-Party Defendant-Appellee below (11a). It is undisputed that on this date Gasperino and five other employees of Ford were working in the basement of the building occupied by Larsen Ford, Inc., hereinafter designated "Larsen", a Ford dealer, in White Plains, New York, making one hundred new Ford Mustang cars, which had recently arrived from the Ford plant in Detroit, Michigan, ready for their first public exhibition. Pursuant to an arrangement previously entered into between Ford and Larsen, under which Larsen was to be paid $20.00 a car by Ford for the use of this space in its White Plains building (296a), Larsen had made the space available to Ford for this purpose, so that the new cars could be kept "under wraps" until they were finally ready to be publicly displayed (20a).

The space in question, which covered an area of some 20,000 square feet in the basement of the Larsen building, had no mechanical ventilation of any kind, although Carl Larsen, the president of Larsen, admittedly was aware of the fact that during the course of work being performed by Gasperino and the other Ford employees working on the premises it would be necessary for them to start the motors in the one hundred Mustang cars and move the cars from one point in the basement to another in order to work

on them (301a). He further admitted that some of the windows in the basement were broken and covered over with plastic sheets (311a), so that no natural ventilation whatever could enter the basement through broken windows.

Shortly before he died the decedent's body was found slumped over in one of the cars on which he had been working. He was sweating excessively and complaining of pains in the chest (115a, 193a, 324a, 336a, 346a-347a). The police were summoned and administered oxygen to him (115a-116a, 191a, 325a) and Gasperino was then taken to the hospital, where he died at 3:50 o'clock that afternoon (325a-326a, Exh. 4, 350a).

The medical proof adduced at the trial establishes, and the District Court so found, that the decedent had inhaled sufficient quantities of carbon monoxide fumes from the exhausts of the cars on which he and the other Ford employees were working to precipitate a coronary thrombosis because of a preexisting atherosclerotic condition from which he was suffering (22a-23a, 54a-55a, 179a-182a).

Decisions Below

As the Court will see when it examines the opinion and decision of the District Court, which will be found at pages 37-55 of the petition of Larsen herein, The District Court specifically found:

(1) That the premises "in which the decedent was working was a workroom in a factory within the meaning of § 299" of the New York Labor Law and that the decedent was a person within the class intended to be protected by said statute and § 316 of the New York Labor Law and that "defendant Larsen Ford violated § 299 by failing to provide mechanical ventilation as required there-

in" (Petition, pp. 42-43).

(2) That Larsen also failed to provide the decedent with a safe place to work, as mandated by § 200 of the New York Labor Law (Petition, pp. 49-50).

(3) That the aforesaid violations of §§ 299 and 200 of the New York Labor Law were proximate causes of the decedent's death (Petition, pp. 40-41).

(4) That "To give credence to Larsen's cross-claim" for common-law indemnity against Ford "this court would have to ignore its crucial findings that Larsen violated §§ 200 and 299 of the Labor Law of New York insofar as it failed to provide the plaintiff [the decedent] with a safe place to work, failed to provide the required and appropriate ventilation facilities, and that Gasperino was in no way negligent" and that "The court therefore finds that Larsen was the active tortfeasor if those words have any meaning at all" (Petition, p. 51).

As heretofore noted, the Court of Appeals for the Second Circuit unanimously affirmed all of the above findings, except the finding that Larsen violated Section 299 of the Labor Law, which the Court neither affirmed nor rejected (Petition, pp. 30-36).

With respect to the amount of the damage award which District Judge Edelstein allowed the decedent's Estate, the Court of Appeals stated (Petition, p. 36):

> "The Defendant-Appellant [Larsen] also claims that the damages awarded were excessive. That an award may be reviewed is beyond peradventure.

Dagtello v. *Long Island Rail Road Co.*, 289 F. 2d 297 (2 Cir. 1961); *Wicks* v. *Henken*, 378 F. 2d 395 (2 Cir. 1967); *Caldecott, Admx.* v. *Long Island Lighting Co.*, 417 F. 2d (2 Cir. 1969) and *Bazydlo* v. *Placid Marcy Co., Inc.* (2 Cir. March 3, 1970). Larsen has advanced its contention earnestly, and we may observe that at first blush, the award seems excessive.

However, taking account of *Gruenthal* v. *Long Island R. R.*, 393 U. S. 156, 159 (1968) we have ourselves examined the record evidence involved in the findings of the trial judge who had carefully detailed the respective elements on which he based the award. Judge Edelstein approached the problem in respects not greatly different from those considered in *United States* v. *Furumizo*, 381 F. 2d 965 (9 Cir. 1967), where the judge, sitting without a jury, spelled out the factors upon which he predicated his computation and the ultimate award. See also *United States* v. *Sommers*, 351 F. 2d 354, 359-360 (10 Cir. 1965); *O'Connor* v. *United States*, 269 F. 2d 578 (2 Cir. 1959). After a fair appraisal of the claims advanced by Larsen measured against the findings, not without support in the record, we are satisfied the award should be permitted to stand."

Statutes

The pertinent statutes are Sections 200, 299 and 316 of the New York Labor Law, and also Sections 2(7) and (9) of the New York Labor Law.

Section 200 of the New York Labor Law, insofar as it is relevant in the case at bar, provides:

"1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons

employed therein or lawfully frequenting such places. * * *"

The relevant portions of Section 299 of the New York Labor Law, reads as follows:

"1. Every work room in a factory shall be provided with proper and sufficient means of ventilation, natural or mechanical or both, as may be necessary, * * *.

"2. All machinery creating dust or impurities in quantities tending to injure the health of employees shall be equipped with proper hoods and pipes connected to an exhaust fan of sufficient capacity and power to remove such dusts or impurities; such fan shall be kept running constantly while such machinery is in use. * * *.

"3. If dust, gases, fumes, vapors, fibers or other impurities are generated or released in the course of the business carried on in any workroom of a factory, in quantities tending to injure the health of the employees, suction devices shall be provided which shall remove such impurities from the workroom, at their point of origin where practicable, by means of proper hoods connected to conduits and exhaust fans. Such fans shall be kept running constantly while the impurities are being generated or released."

Subdivision 1 of Section 316 of the New York Labor Law provides

"1. Except as in this article otherwise provided, the person operating a factory, whether as owner or lessee of the whole or a part of the building in which the same is situated or otherwise, shall be responsible for the observance of the provisions of this article, anything in any lease or agreement to the contrary notwithstanding."

Section 2 of the New York Labor Law, which is entitled "Definitions", provides as follows in subdivisions (7) and (9) thereof:

> "Wherever used in this chapter
>
> * * *
>
> 7. 'Employed' includes permitted or suffered to work.
>
> * * *
>
> 9. 'Factory' includes a mill, workshop or other manufacturing establishment, where one or more persons are employed at manufacturing, including making, altering, repairing, finishing, canning, cleaning or laundering any article or thing in whole or in part, and includes all buildings, sheds, structures or other places used for or in connection therewith [with certain enumerated exceptions which are not relevant in the case at bar] * * *"

In finding that Larsen violated Section 299 of the New York Labor Law the District Court specifically found that "Larsen was a person operating a factory within the meaning of § 316(f)" (Petition, p. 43), and, as heretofore noted, this finding was not overruled by the Court of Appeals, although the Court in a footnote to its opinion expressed some doubt as to its propriety (Petition, p. 34).

FIRST POINT

The petition of Larsen fails to establish any basis for the granting of a writ of certiorari herein.

The petition of Larsen seeks to bring up for review in this Court only the following questions of law:

(1) Whether there is a conflict between the holding of District Judge Edelstein that said petitioner or defendant below also violated Section 200 of the

New York Labor Law, as said statute has been construed by the decisions of the Court of Appeals of the State of New York (Petition, pp. 7-15);

(2) Whether, under the New York decisions, the violation of Section 200 of the New York Labor law constitutes "active" negligence, so as to bar the common-law right of indemnity (Petition, pp. 15-18); and

(3) Whether the damages awarded to the Estate of Gasperion are "so egregiously excessive as to amount to a denial to petitioner of equal protection under the law," and whether said damage award is "in clear conflict with decisions of this Court, of the Courts of Appeals and other federal courts in respect to the rules of damages in death actions" (Petition, pp. 19-23).

It will be observed that petitioner does not seek to review the finding of District Judge Edelstein that said defendant violated Section 200 of the New York Labor Law, which mandated that the basement in which the decedent was working be "provided with proper and sufficient means of ventilation, natural or mechanical or both". Since Rule 23, par. 1(c) of the Supreme Court Rules provides that "only the questions set forth in the petition or fairly comprised therein will be considered by the court" on a writ of certiorari, it is therefore submitted that, if a writ of certiorari is granted herein, it will not bring up for review the crucial question of law raised by this finding of District Judge Edelstein (*Namet v. United States*, 373 U.S. 179, 190, 83 S. Ct. 1151, 10 L. Ed. 2d 278 [Mass., 1963], which, as already noted, was neither affirmed nor rejected by the Court of Appeals.

I.

Even though it be assumed *arguendo* that District Judge Edelstein may possibly have erred in holding that Larsen

also violated Section 200 of the New York Labor Law—although the Court of Appeals held otherwise—in view of his previous holding that Larsen violated Section 299 of the New York Labor law, it is submitted that the finding of liability herein will have to be affirmed on this latter ground. It will thus be seen that the question of whether or not Larsen also violated Section 200 of the New York Labor Law is really a purely academic or moot question insofar as the basic issue of liability herein is concerned.

Actually, however, District Judge Edelstein did not err in holding that, in addition to violating Section 299 of New York Labor Law, Larsen also violated Section 200 of the New York Labor Law, which is commonly known as the "safe place to work" statute. By no stretch of the imagination can it be claimed that a place to work, where, because of the absence of adequate ventilation, the lives of the people working there are placed in jeopardy by an atmosphere that is heavily laden with carbon monoxide fumes is a reasonably safe place to work, within the meaning of Section 200 of the New York Labor Law or any other "safe place to work" statute.

None of the cases cited by Petitioner in support of its contention that the holding of District Judge Edelstein in this regard is "in clear and obvious conflict with the law of New York", as enunciated by the New York Court of Appeals "in a long line of cases" (Petition, pp. 7-18), support this view.

Hess v. *Berheimer & Schwartz Brewing Co.*, 219 N. Y. 415, 114 N. E. 808 (1916), the earliest of the five cases cited by Petitioner, involved an entirely different factual pattern than the one presented in the case at bar. In the *Hess* case here there was no claim that "premises" or "factory" where the plaintiff's intestate was working was unsafe. In that case the plaintiff's intestate was invited onto the premises of the defendant to varnish the interior surfaces of beer vats, where he and his employer

knew or should have known that the safe prosecution of the work required the men doing the same be equipped with blowers which they could take inside the beer vats with them in order to dispell the noxious fumes emanating from the varnish which they were applying to the interior surfaces of the vats. In other words, the danger of asphyxiation in that case was one that was normally incidental to the work that was in progress and did not result from any defect in the premises on which the work was being done, such as an insufficiency of adequate ventilation. It was in this connection that the New York Court of Appeals distinguished between the safety of the premises themselves and the failure of the employer to furnish his employees with proper safeguards for the hazards normally incidental to the hazardous work which they were employed to do.

In the case at bar District Judge Edelstein specifically found that the place where Gasperino was working was a workroom in a "factory", within the meaning of Section 299 of the New York Labor Law, and that Larsen violated its non-delegable statutory duty to provide the room "with proper and sufficient means of ventilation, natural or mechanical or both" (N. Y. Labor Law, § 299, subd. 1), and this finding was not overruled by the Court of Appeals for the Second Circuit. There is no New York case which holds or suggests that where the duty to supply ventilation, natural or mechanical or both, is by statute placed on the owner or person in control of the premises, the latter may shift the non-delegable duty thus imposed upon him by the Legislature to the shoulders of the employer by claiming that the unventilated factory workroom is a part of employer's own "plant on the job," which is what Petitioner is in effect attempting to do in the case at bar.

Olsommer v. *George W. Walker & Sons, Inc.*, 4 A. D. 424 (App. Div., 4th Dept., 1957), aff'd 4 N. Y. 2d 793, 144 N. E. 2d 528 (1958), and *Gasper* v. *Ford Motor Company*, 13 N. Y. 2d 104, 192 N. E. 2d 163 (1963), have no bearing whatever on the question presently before this Court. In

each of these cases the owners of the premises there involved were exonerated from liability on the ground that the accidents there involved were caused, not by any defect in the premises, but solely because at the time of their occurrence the injured employees of the subcontractor were putting a common structural object to a wholly unintended usage.

In *Zucchelli* v. *City Construction Co.*, 4 N. Y. 2d 52, 149 N. E. 2d 72 (1958), and *Perichilli* v. *Triborough Bridge & Tunnel Authority*, 16 N. Y. 2d 136, 209 N. E. 2d 802 (1965), the accidents were likewise caused by defects in the employer's "plant on the job" rather than, as in the case at bar, by the failure of the owner of the premises or the person in control of the same to discharge a non-delegable duty imposed upon him by a statute which was designed to protect workmen on the premises from a specific hazard, such as asphyxiation.

II.

To support its claim that District Judge Edelstein erred in dismissing its Third-Party Complaint against Ford for common-law indemnity (Petition, pp. 15-18), Larsen again completely ignores the crucial finding of the District Court, that said primary defendant violated Section 299 of the New York Labor Law, which certainly constituted "active" negligence on the part of Larsen, wholly apart from the additional violation of Section 200 of the New York Labor Law. As District Judge Edelstein stated in his opinion and decision, Larsen was "the active tortfeasor if those words have any meaning at all" (Petition, p. 51).

If there is any principle of New York law that is now too well settled to admit of doubt it is that one who violates a statute which is designed to protect a specific class of persons against a specific hazard is guilty of negligence *per se* or as a matter of law as respects all persons falling

within the class sought to be protected, who are injured as a result of the violation of the statute, and is therefore guilty of "active" negligence, as that term is commonly understood in the law of indemnity, which bars his right to recover common-law indemnity against another joint tortfeasor.

Rufo v. Orlando, 309 N. Y. 345, 350, 130 N. E. 2d 887 (1955);
Bobbey v. Turner Construction Corp., 308 N. Y. 890, 891-892, 126 N. E. 2d 566 (1955);
Semenchuck v. Fifth Ave. & 37th St., Corp., 290 N. Y. 412, 420-421, 49 N. E. 2d 507 (1943);
Walters v. Rao Electrical Equipment Co., 289 N. Y. 47, 61, 43 N. E. 2d 810 (1942).

In the case at bar Ford was not guilty of any wrongdoing whatever, so it can hardly be claimed that said Third-Party Defendant was a joint tortfeasor with Larsen. Larsen, through Carl Larsen, its president, admittedly knew the purpose for which Ford intended to use the basement of its building and it also knew that during the course of the work being done there by Gasperino and the five other Ford employees with him it would be necessary for them to operate the motors of the one hundred Mustang cars which they were preparing for public display (301a). As the Court of Appeals stated in its opinion, during the course of this work "The engine of each car had to be started in order to jockey each car into position to afford room to carry out the required operations" (Petition, p. 33). Under these circumstances, it is submitted that Ford had every right in the world to expect that the basement which Larsen supplied for this purpose would have sufficient ventilation, natural or mechanical, in it to prevent its employees from being asphyxiated by carbon monoxide fumes while they were working. In this connection it is significant to note that Larsen, fully aware of the danger to which these men were

being exposed, not only prohibited its own employees from working in this inadequately ventilated basement but that it also took great pains to see that its own dealership repair shop upstairs was "protected by necessary hoses and exhaust systems" (Petition, p. 33).

Wholly apart from any technical concepts of what constitutes "active" as distinguished from "passive" negligence, it is submitted that it is unthinkable that anyone who was guilty of the gross negligence with which Larsen was charged in the case at bar should be allowed to shift the monetary loss resulting from the liability thus imposed upon it in this case to the shoulders of the employer of the innocent victim of its gross negligence, whose only sin, if any, was in not knowing that the premises which Larsen made available to it for the specific purpose of making its new Mustang cars ready for public display were not adequately ventilated.

III.

The recovery allowed in this case may, as the Court of Appeals observed in its opinion, "at first blush" appear to be somewhat "excessive", but, as the Court further pointed out, taking into account all of the damage factors considered by District Judge Edelstein, it cannot be said to be so excessive as to justify an appellate reviewing Court in disturbing the same (Opinion, p. 36).

The amount awarded by District Judge Edelstein, sitting as a jury, was $215,899.00, plus mandatory statutory interest in the sum of $64,770.00. This was not a figure which District Judge Edelstein "picked out of the thin air". It was a figure based upon a careful and painstaking analysis and calculation of all of the damage elements which the Court was required to consider (Petition, pp. 53-55).

At the time of his death Gasperino was a married man with a life expectancy of 26.3 years and a work expectancy of 18.8 years (Petition, p. 53). For each of the five years

immediately preceding his death he earned approximately $10,000.00 a year and, had he lived, he could have looked forward to increased earnings in the future (Petition, pp. 53-54). Damage awards in the amount involved herein and even higher amounts are daily being made in comparable wrongful death actions in New York in both the State and Federal District Courts.

It is submitted that there is no substance whatever to petitioner's claim that "The damages awarded in this case are so egregiously excessive as to amount to a denial to petitioner of equal protection under the law, and the award is in clear conflict with decisions of this Court, of the Courts of Appeals and other federal courts in respect to the rules of damages in death actions" (Petition, p. 19).

Although this award may be somewhat high, it is clearly not so excessive as to justify an appellate reviewing Court in reducing the amount of the same.

CONCLUSION

The petition of Larsen Ford, Inc., for a writ of certiorari herein should be denied.

Dated: New York, New York, September 17, 1970.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM 1970

No. 647

LARSEN FORD, INC.,

Petitioner,

against

NANCY GASPERINO, as Administratrix of the Estate of Gregory Gasperino, Deceased,

and

FORD MOTOR COMPANY,

Respondents.

BRIEF FOR RESPONDENT, NANCY GASPERINO, IN OPPOSITION TO PETITION OF LARSEN FORD, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Introductory Statement

This brief is submitted by respondent administratrix (plaintiff in the trial court) in opposition to the petition for certiorari of Larsen Ford, Inc. (defendant in the trial court).

The opinion of the District Court appears at 300 F. Supp. 1182 (Honorable David N. Edelstein, sitting without a jury), and the unanimous affirmance by the Second Circuit Court of Appeals appears at 426 F. 2d 1151.

Federal jurisdiction based upon diversity of citizenship was conceded. The evidence established that plaintiff's decedent, an employee of the Ford Motor Company, died as a result of his exposure to carbon monoxide poisoning in the basement of premises entirely operated and occupied by defendant Larsen Ford, Inc. For a monetary consideration, defendant Larsen had made its premises available to Ford Motor Company. The evidence further showed that Carl Larsen, the president of Larsen Ford, Inc., affirmatively directed the decedent to perform his work in the basement with full knowledge that the basement lacked statutory safety equipment or any other ventilating facilities and that the operation which Gasperino and his fellow workers were required to perform would *necessarily* result in the production of carbon monoxide fumes. Larsen knew that his men had covered the windows of the basement with plastic, thereby decreasing the natural ventilation (311a).* He also personally forbid his men to work in that basement (174a) evidencing his knowledge that it was unsafe. It had, no mechanical ventilation (41a) of the type that Larsen customarily provided for his own men (165a) and he nevertheless directed Gasperino and his fellow mechanics to work in that specific area (173a), which was deceptively safe appearing (op. 31a).

The Trial Court was therefore amply justified in finding that defendant failed to provide decedent with a safe place to work and failed to warn him of the known danger. The evidence affirmatively showed that defendant's plant was unsuited to the use for which it was put and intended by Larsen to be put (170a) by reason of the absence of exhaust systems required by statute (Section 299, New York State Labor Law) by rule (N. Y. Industrial Code Rules 12 and 18) and by Larsen's own custom and usage (165a).

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* Numbers followed by the letter "a" refer to the appendix in the court below.

The complaint herein charged defendant Larsen Ford, Inc. with violation of an absolute liability statute (Section 299 of the New York State Labor Law) and with negligence in violating said statute and in violating Section 200 of the same law which mandates that "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places". Judge Edelstein made specific findings of violation of both sections of the Labor Law. He further held that Section 299 was intended to and did create a cause of action for violation of statute and that defendant's violations of Sections 200 and 299 of the Labor Law were a proximate cause of the decedent's death. He further found that the decedent was not contributorily negligent.

It is noted, respectfully, that neither the defendant, Larsen, nor the third party defendant, Ford Motor Company, offered any medical evidence whatever to controvert the cause of death. Nor did they offer any evidence controverting the financial matters testified to by plaintiff's witnesses. Plaintiff's evidence established that the decedent had been recently promoted, was about to be again promoted, had recently completed numerous company courses for advancement purposes, and that decedent had moved up from the sales to the executive level. The court itemized with great specificity its computation of damages in the sum of $215,899.00. Pre-judgment interest under the New York Decedent's Estate Law was added thereto as required by statute, and judgment was entered in the total sum of $280,669.00. Said judgment was entered solely against the defendant Larsen Ford, and its third party claim for indemnity was dismissed by reason of the trial court's finding, affirmed by the Second Circuit, that Larsen "was the active tortfeasor if those words have any meaning at all." 300 F. Supp. 1191; 426 F. 2d 1154, fn. 5.

On appeal, the judgment was affirmed by the Second Circuit Court of Appeals in the unanimous opinion by Judge Danaher (sitting by designation) and petitioner's motions for rehearing and rehearing en banc were denied.

In its opinion, the Second Circuit affirmed all of the findings of the District Court with the sole exception of the applicability of Section 299 of the New York Labor Law to an employee of other than the owner or operator of the premises. In that respect the Court noted that it was unable to find a New York decision making such application and that it was unnecessary to further consider Judge Edelstein's "appealing treatment of this aspect of the case" for the reason that the judgment had to be affirmed under Section 200 of the New York Labor Law. In its petition for certiorari, defendant Larsen has not asked this Court to review or consider Judge Edelstein's finding in favor of the plaintiff under Section 299, although that finding stands unreversed by the Second Circuit and provides an independent state ground which fully supports the judgment herein.

Statement of the Case

On April 3, 1964, decedent was advised that a special shipment of Mustang automobiles was being sent by the Ford Motor Company to Larsen Ford, Inc. At that time, the Mustang automobile had not yet been exposed to public view. Gasperino and his co-workers were instructed to remove the Mustangs from the delivery trucks and to perform make ready work upon them in preparation for a public exhibition of these cars. Carl Larsen, president of Larsen Ford, Inc., directed that this work be performed in the basement of Larsen's premises. This basement area contained no mechanical ventilation of any kind, and Larsen had specifically forbidden its own employees to work in that area by reason of the danger of carbon monoxide and his knowledge of the lack of ventilation.

Larsen further knew the purpose and nature of the work, to be performed by Gasperino and his co-workers, which necessarily involved the running of the engines for the purpose of checking fluid levels. In addition, Larsen knew that by reason of the large number of cars involved, it would be necessary to move the cars about in order to work on them. Larsen had received a monetary consideration for the use of his premises. Larsen gave no warning of any kind to Gasperino or his co-workers of the inherent danger of which Larsen was aware and which Judge Edelstein found to be a "deceptively dangerous condition". Larsen also knew that certain of his employees had covered the windows of the basement with plastic to keep out the cold.

The uncontroverted medical proof conclusively established that while working in the basement on April 6, 1964, decedent and two other employees were stricken by carbon monoxide fumes. The other two employees recovered. Gasperino, as a proximate result of his exposure to excessive carbon monoxide, suffered a coronary thrombosis from which he died. The medical evidence also established that although the decedent had a pre-existing unknown atherosclerotic condition, this condition was "well compensated" and in no way prevented him from performing his work. It was only the extreme exposure to carbon monoxide that caused his death.

Questions Presented

(1) Whether the Courts below correctly interpreted the concededly applicable state law (Section 200 of the N. Y. Labor Law)?

(2) Whether the Courts below correctly interpreted the concededly applicable state law of indemnity?

(3) Whether the Courts below awarded damages in an amount which denies petitioner equal protection?

Decisions Below

The District Court in its opinion, which appears at pages 37 through 55 of the petition herein, specifically found:

(1) That the premises "in which the decedent was working was a workroom in a factory within the meaning of Section 299" of the New York Labor Law and that the decedent was a person within the class intended to be protected by said statute and Section 316 of the New York Labor Law and that "defendant Larsen Ford violated Section 299 by failing to provide mechanical ventilation as required therein" (Petition, pp. 42-43).

(2) That Larsen also failed to provide the decedent with a safe place to work, as mandated by Section 200 of the New York Labor Law (Petition, pp. 49-50).

(3) That the aforesaid violations of Sections 299 and 200 of the New York Labor Law were proximate causes of the decedent's death (Petition, pp. 40-41).

(4) The premises presented an illusion of a safe place in which to work, when, in fact, it was not safe at all. Its appearance was so deceiving as to be able to mask successfully a very dangerous condition. The garage's deceptively dangerous condition could hardly have been realized in the exercise of ordinary prudence and discretion. It is indeed doubtful that the danger of carbon monoxide poisoning became apparent until Gasperino and two of his coworkers were stricken, and perhaps not even then. In sum, what the record reveals to this Court is that Gasperino asserted that degree of care which others of his type and position would ordinarily exercise under comparable conditions and circumstances (Petition, p. 48).

(5) That itemized damages as computed under applicable New York Law amounted to $215,899.00; and

(6) That the cross-claim for indemnity had to be dismissed by reason of Larsen's active negligence.

The Second Circuit in its opinion (pp. 30-36 of the petition) unanimously affirmed all of the above findings with the exception of the applicability of Section 299 to decedent, noting that it was unnecessary to pass on Judge Edelstein's "appealing treatment of this aspect of the case" because of its affirmance upon the alternative ground. Thus, the Court, in affirming under Section 200 of the Labor Law, was acutely aware of the group to whom that statute applied. It agreed unanimously with Judge Edelstein's conclusion that decedent was entitled to the benefits thereof. The Circuit Court also carefully reviewed the contention that damages were excessive and affirmed in the precise amount of the District Court's award.

Statutes

The pertinent statutes are Sections 200, 299 and 316 of the New York Labor Law, and also Sections 2(7) and (9) of the New York Labor Law.

Section 200 of the New York Labor Law, insofar as it is relevant in the case at bar, provides:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. * * *"

The relevant portions of Section 299 of the New York Labor Law, reads as follows:

> "1. Every work room in a factory shall be provided with proper and sufficient means of ventilation,

natural or mechanical or both, as may be necessary, * * *.

"2. All machinery creating dust or impurities in quantities tending to injure the health of employees shall be equipped with proper hoods and pipes connected to an exhaust fan of sufficient capacity and power to remove such dusts or impurities; such fan shall be kept running constantly while such machinery is in use. * * *

"3. If dust, gases, fumes, vapors, fibers or other impurities are generated or released in the course of the business carried on in any workroom of a factory, in quantities tending to injure the health of the employees, suction devices shall be provided which shall remove such impurities from the workroom, at their point of origin where practicable, by means of proper hoods connected to conduits and exhaust fans. Such fans shall be kept running constantly while the impurities are being generated or released."

Subdivision 1 of Section 316 of the New York Labor Law provides:

"1. Except as in this article otherwise provided, the person operating a factory, whether as owner or lessee of the whole or a part of the building in which the same is situated or otherwise, shall be responsible for the observance of the provisions of this article, anything in any lease or agreement to the contrary notwithstanding."

Section 2 of the New York Labor Law, which is entitled "Definitions", provides as follows in subdivisions (7) and (9) thereof:

"Wherever used in this chapter

* * *

7. 'Employed' includes permitted or suffered to work.

* * *

9. 'Factory' includes a mill, workshop, or other manufacturing establishment, where one or more persons are employed at manufacturing, including making, altering, repairing, finishing, canning, cleaning or laundering any article or thing in whole or in part, and includes all buildings, sheds, structures or other places used for or in connection therewith [with certain enumerated exceptions which are not relevant in the case at bar] * * *"

POINT I

The petition fails to establish sufficient reason for granting a writ of certiorari.

A. The first question sought to be reviewed seeks an advisory opinion as to New York law.

Larsen urges that the Court of Appeals wrongly applied Section 200 of the New York Labor Law. It does not urge that the court applied the law of the wrong jurisdiction. It does not urge that the district court or the Court of Appeals failed to follow any federal rule as to applicable law, but merely that the interpretation of New York law reached by the trial court and concurred in by the Circuit Court of Appeals is in error as *a matter of New York State law*. It is thus apparent that the question sought to be presented for review would require this Court to render an advisory opinion as to certain decided New York cases which would in no way be binding upon the New York Court of Appeals. That Court could thereafter render a contrary opinion on the same questtion which would be binding on all of the courts of the State of New York and, indeed, upon the Second Circuit Court of Appeals and even upon this Court. It is respectfully sug-

gested that this Court has in the past refrained as a matter of policy from issuing advisory opinions because of the non-binding effect of such opinions and out of a proper deference to the Federal-State relationship.

Moreover, it is respectfully noted that the objection made to the interpretation of New York State law in the court below is that Section 200 does not apply to a person other than an employee of the owner or operator of the premises. The statute, as set forth above, specifically makes such section applicable "to provide reasonable and adequate protection to the lives, health and safety *of all persons employed therein or lawfully frequenting such places*". By reason of Section 2(7) set forth above the same law defines employed as "permitted or suffered to work". There is no question in this case that decedent was permitted to work on Larsen's premises and there is also no question that he was lawfully frequenting the same. Thus, it is apparent on its face that the statute refutes the contention urged.

The federal circuit courts have long accorded great respect to the opinion of a trial judge as to State law. *Woodhull* v. *Minot Clinic*, 259 F. 2d 676, 678 (8th Cir. 1958); *Rudd-Melikian, Inc.* v. *Merritt*, 282 F. 2d 924, 929 (6th Cir. 1960). *A fortiori*, it would seem logical that this Court should afford great weight to such a trial court's determination, reinforced by the unanimous opinion of the federal circuit court citing in that state.

In the instant case, footnote 5 of the Circuit Court's opinion demonstrates a keen awareness on the part of the Circuit Court of the persons protected by each of the statutes involved, and that Court's recognition that while petitioner's argument may have some merit as to New York Labor Law Section 299, it does not have similar merit as to Section 200 of the same law. The authorities cited in *Burns* v. *Cunard Steamship Company*, 404 F. 2d

60 (2nd Cir. 1968), *cert. denied*, 393 U. S. 1117 (1969), cited by the Second Circuit in this case, reflect the correct view of New York law applicable both to this point and to the indemnity argument advanced by petitioner.

All of the cases cited by petitioner relate to defects in a contractor's apparatus or method of performing his work. In this case the evidence conclusively established that the Ford employees performed their work normally, without defect as to method or equipment. The evidence also showed that the plant itself (belonging to defendant Larsen Ford, Inc.) was defective for the purpose for which Larsen intended it to be used by reason of the absence of statutorily mandated ventilating equipment and by reason of its plastic covered windows which kept out natural ventilation. No evidence was introduced, and none is referred to or cited by petitioner, which could have arguably controverted the factual showing upon which the legal conclusions of the courts below were based. In this situation, it is submitted the record does not even present for review the question upon which petitioner seeks an advisory opinion from this court.

B. The second question sought to be reviewed seeks an advisory opinion as to New York law.

While the Administratrix has no direct interest in the question of indemnity, we do respectfully point out to the court that here too petitioner is seeking an advisory opinion of this Court as to New York law. This opinion, as in the case of the first question presented would not be binding on the New York Court of Appeals whose subsequent decision would, under established federal law, be binding on the federal courts. We respectfully submit that federal-state comity and the absence of any federal question (since the law of the correct jurisdiction has been applied) mandate a denial of the writ upon this ground as well.

C. The third point sought to be reviewed presents no constitutional or substantial federal question.

Petitioner here, as in the Circuit Court, advances a lengthy argument concerning damages based upon cases dealing with percentages of decedent's income allowed depending upon the number and nature of the surviving relatives. We respectfully urge that this argument has in no way been connected with the facts established in the record in the instant case. We take no position with regard to the viability of these cases since it is our contention that where, as here, the record abundantly evidences a definite method of utilization of earnings by the decedent over an extended period of time, the district judge is permitted to apply the considerations specified by this court in *Gruenthal* v. *Long Island R. R.*, 393 U. S. 156, 1968, in computing damages based upon the facts established in the record. The Circuit Court, agreeing with this view, itself "examined the record evidence involved in the findings of the trial judge who had carefully detailed the respective elements on which he based the award", 426 F. 2d at 1154. It concluded "After a fair appraisal of the claims advanced by Larsen, measured against the findings not without support in the record, we are satisfied the award should be permitted to stand", Ibid.

The findings were based upon an extensive record which included evidence showing that the decedent in his employment with the Ford Motor Company had been promoted a short time after commencing employment and was about to be promoted again. He had moved from the sales to the executive level and was conceded to be an extremely highly thought of employee. By reason of his expense account, his personal expenditures were extremely modest and his family benefited more substantially than in the average case from his earnings. This was established by evidence of what was actually done with his income over a period of many years preceding his death.

There was abundant evidence that the decedent was an unusually devoted father, who taught both his sons his profession and who spent numerous hours with his daughter and with the family as a whole. Indeed, Mrs. Gasperino described the family as one which did not go out a great deal, their chief recreation being a family visit which lasted virtually an entire Sunday.

These and other facts with which the record is repleat were taken into account in both the district and circuit courts in accord with the various cases cited in the opinion of the Circuit Court. We respectfully submit that even were this award somewhat more generous than in other cases, that difference is based upon the evidence in this record and in any event does not present a constitutional or substantial federal question. Again, it is the New York State law of damages in this New York death action, tried in the federal court only by reason of diversity, which is controlling. We note respectfully that the petitioner cites not a single New York case alleged to conflict with the interpretation of New York Decedents Estate Law, Section 132, which was utilized in the courts below.

CONCLUSION

For the reasons above stated it is respectfully submitted that the petition herein should be denied in its entirety.

Respectfully submitted

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